Supreme Court of the United States

No._____

WILLIAM STEVENS COAKER, PETITIONER

vs.

THE STATE OF TEXAS, RESPONDENT

Petition for Writ of Certiorari and Supporting Brief

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner, William Stevens Coaker, and files this his Petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas, and would respectfully show the Court:

STATEMENT OF THE MATTER INVOLVED

Petitioner was convicted on November 17, 1952, in the District Court of Karnes County, Texas, of the felony offense of driving while intoxicated, and as his punishment was assessed a fine of $2,000 and confinement in the County jail for 90 days (R. 23). On April 29, 1953, Petitioner's con-

viction was affirmed by the Court of Criminal Appeals of Texas, being the Court of last resort in criminal cases in the State of Texas (R. 5, 6, 20). The opinion of said court is reported in 259 S. W. (2d.) 220. Petitioner's motion for rehearing was overruled by the Court of Criminal Appeals on June 10, 1953 (R. 10, 21). The opinion on said motion for rehearing is reported in 259 S. W. (2d.) 221. In his second motion for rehearing he urged that his conviction was retroactive and erroneous, but such second motion failed to fully point out wherein the conviction contravened the Federal constitution (R. 11-12). Such second motion for rehearing was overruled by the Court of Criminal Appeals without written opinion on June 27, 1953 (R. 13, 21). On July 13, 1953, Petitioner filed his motion for leave to file his third motion for rehearing and to recall mandate (R. 13-14) and tendered therewith for filing his third motion for rehearing (R. 15-19). In such third motion for rehearing, Petitioner fully raised the Federal question that his conviction violated Article 1, Section 9, Clause 3, of the Federal Constitution in that Article 802b of the Penal Code of Texas, the felony drunk driving statute, is an ex post facto law as applied to Petitioner because it permits Petitioner's conviction for the felony offense defined by Article 802b for an act committed by him prior to the passage of said Article 802b. On July 13, 1953, the Court of Criminal Appeals of Texas, having duly considered said third motion and "being of the opinion that said third motion for rehearing is without merit," denied leave to file the same (R. 20). On July 13, 1953, said Court of Criminal Appeals recalled the mandate theretofore issued by the Court and stayed and held in abeyance all proceedings in said cause to permit Petitioner to petition the Supreme Court of the United States for a writ of certiorari to review his conviction, and ordered that all proceedings be

stayed and held in abeyance pending final action of this Honorable Court (R. 21-22). This petition is filed to secure a review and reversal of his conviction.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1257, paragraph (3), United States Code Annotated.

The Statute of the State of Texas, the validity of which is here involved, is Article 802b of the Penal Code of Texas and may be found in the 1952 Cumulative Annual Pocket Part of Volume 2 of Vernon's Annotated Penal Code of the State of Texas, on page 30 of said pocket part. Said Article 802b provides as follows:

> "Any person who has been convicted of the misdemeanor offense of driving or operating an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within an incorporated city, town or village, while intoxicated or under the influence of intoxicating liquor, and who shall thereafter drive or operate an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall for each and every subsequent such violation be guilty of a felony; and upon conviction shall be punished by a fine of not less than $100 nor more than $5,000 or confinement in the county jail not less than 10 days nor more than two years, or by both such fine and imprisonment, or by confinement in the state penitentiary not to exceed 5 years. As amended Acts 1951, 52nd Leg., p. 813, ch. 457, § 1."

As heretofore stated, the judgment of the Court of Criminal Appeals of Texas, affirming Petitioner's conviction,

was rendered on April 29, 1953 (R.6). Petitioner's second motion for rehearing was overruled August 28, 1953 (R. 13). Under such facts, Petitioner had 90 days after the overruling of his second motion for rehearing (Gypsy Oil Co. v. Escoe, Okl. 1927, 48 S. Ct. 112, 257 U. S. 498) within which to file this petition for writ of certiorari. 28 U.S.C.A. Sec. 2101, paragraph (d). U.S. Sup. Ct. Rule 38½, U.S.C.A. 28. On September 17, 1953, the Honorable Hugo L. Black, Associate Justice of this Honorable Court, extended the time for filing this petition and docketing the record to and including November 1, 1953, and again, on October 29, 1953, further extended such time to and including November 10, 1953, and this petition, brief, and the record in this cause, are filed and docketed prior to such extended date of November 10, 1953.

QUESTION PRESENTED

ARTICLE 802b OF THE TEXAS PENAL CODE, AS AMENDED IN 1951, IS AN EX POST FACTO LAW, AS APPLIED TO PETITIONER, AND HAS BEEN GIVEN RETROACTIVE APPLICATION TO PETITIONER IN VIOLATION OF ARTICLE 1, SECTION 1, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES, IN THAT PETITIONER STANDS CONVICTED OF THE FELONY OFFENSE OF DRUNK DRIVING, DEFINED BY SAID ARTICLE 802b, FOR AN OVERT ACT CONSTITUTING AN ESSENTIAL ELEMENT OF THE FELONY OFFENSE, COMMITTED BY HIM PRIOR TO THE PASSAGE OF SAID ARTICLE 802b, AS AMENDED IN 1951, SUCH OVERT ACT BEING THE COMMISSION OF THE

MISDEMEANOR OFFENSE OF DRIVING WHILE INTOXICATED, AND OF WHICH MISDEMEANOR OFFENSE HE WAS CONVICTED ON OCTOBER 17, 1950.

The question here presented was not raised by Petitioner in the trial court. It was raised, in substance, in Petitioner's second motion for rehearing (R. 11-12), which was overruled by the Court of Criminal Appeals, but was directly and explicitly presented in Petitioner's third motion for rehearing (R. 15-19) which was considered by the Court of Criminal Appeals, but was denied filing by said Court, "the Court being of the opinion that said third motion for rehearing is without merit."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Criminal Appeals of Texas has decided a federal question in a way probably not in accord with the applicable decisions of the Supreme Court of the United States. Specifically, the felony drunk driving statute involved, Article 802b, as amended in 1951, has been construed by the Court of Criminal Appeals of Texas to create a new offense with material changes insofar as punishment is concerned and construed not to constitute an "enhancement-of-punishment" statute, in Clifton v. State, 246 S.W. (2d) 201, in which the Court said:

> "This prosecution is not one arising under those statutes commonly referred to as the enhancement-of-punishment statutes, Art. 61 to 64, inclusive. Vernon's Penal Code. Indeed, we are aware of no general statute whereby a prior misdemeanor conviction may be utilized to enhance the punishment

for a subsequent felony conviction. The enhancement-of-punishment statutes cited do not so provide.

Article 802b, Vernon's P.C., under which this prosecution was maintained defines the felony offense of drunk driving as an independent crime, and is not an enhancement-of-punishment statute. The instant indictment follows the provisions of that statute, and charges the constituent elements, constituting the offense as therein set forth.

The fact that the 52nd Legislature, in 1951, by Chap. 457, amended Art. 802b, P.C., and made material changes therein—especially in so far as the matter of punishment is concerned—cannot and does not change or affect this case which was tried prior to the amendment. Art. 13, Vernon's P.C.; Davis v. State, 142 Tex.Cr.R. 602, 155 S.W. 2d 801."

Enhancement-of-punishment statutes have uniformly been held by all the courts not to be objectionable as ex post facto laws. 16 C.J.S., Sec. 450, p. 901, and cases there cited. In spite of the holding of the Court of Criminal Appeals in Clifton v. State, supra, that the statute involved, as amended, is not an enhancement-of-punishment statute, it has, nevertheless, permitted and sustained Petitioner's conviction for a separate and distinct felony offense which includes, as one of its elements, an overt criminal act committed by Petitioner prior to the passage of the felony statute. Detailed reasons and authorities are given and cited in the brief, annexed hereto, as to why the writ of certiorari should be granted herein, and said brief is made a part hereof.

WHEREFORE, the Petitioner, William Stevens Coaker, prays that a writ of certiorari be granted herein, directed to the Court of Criminal Appeals of Texas, that on hearing

hereof Petitioner's conviction be reversed, and that all other proceedings be had herein as provided by law.

RONALD SMALLWOOD
906 Maverick Building
San Antonio, Texas

SAM L. HARRISON
906 Maverick Building
San Antonio, Texas

EMMETT J. RAHM
Majestic Building
San Antonio, Texas

Attorneys for Petitioner,
WILLIAM STEVENS COAKER.

STATE OF TEXAS }
COUNTY OF BEXAR }

Before me, the undersigned authority, on this day personally appeared Ronald Smallwood, who being by me duly sworn, upon his oath deposes and says: I am one of the attorneys of record of the Petitioner, William Stevens Coaker; I have read the above and foregoing petition and the facts therein set out are true.

RONALD SMALLWOOD

Subscribed to and sworn before me this _____ day of November, 1953.

NOTARY PUBLIC, Bexar County, Texas

PETITIONER'S BRIEF

The one and only question involved in this proceeding is whether Article 802b of the Texas Penal Code, as amended in 1951, has been given retroactive application as to this Petitioner and thus violates Article 1, Section 9, Clause 3, of the Federal Constitution. The question presented may be stated in this manner: Can Petitioner's **misdemeanor** conviction of drunk driving in 1950 be used as a basis for a felony conviction under the new felony statute, Article 802b, passed in 1951? The Court of Criminal Appeals has said that a prior misdemeanor conviction may not be utilized to enhance the punishment for a subsequent felony conviction, Clifton v. State, 246 S.W. (2d) 201, but that is exactly what has been done in this case.

Article 47 of the Penal Code of Texas distinguishes between misdemeanors and felonies in the following language: "An offense is an act or omission forbidden by law, and to which is annexed, on conviction, any punishment prescribed in this Code. An offense which **may - not must - be punishable** by death or **by confinement in the penitentiary is a felony; every other offense is a misdemeanor.** Felonies are either capital or not capital. An offense for which the highest penalty is death is a capital felony. Offenses are divided into felonies and misdemeanors."

This particular statute, as amended in 1951, was expressly declared to create a new felony offense in Clifton v. State, supra, and not merely to change the punishment.

Petitioner's position is fully set forth in his third motion for rehearing presented to the Court of Criminal Appeals.

Said motion is set out in the record herein on pages 15, 16, 17, 18, and 19. Rather than be guilty of mere repetition of the argument advanced in that motion, Petitioner here adopts said third motion for rehearing as his brief in support of his petition for writ of certiorari.

Respectfully submitted,

RONALD SMALLWOOD
906 Maverick Building
San Antonio, Texas

SAM L. HARRISON
906 Maverick Building
San Antonio, Texas

EMMETT J. RAHM
Majestic Building
San Antonio, Texas

Attorneys for Petitioner,
WILLIAMS STEVENS COAKER